No. 14-378

In the Supreme Court of the United States

STEPHEN DOMINICK MCFADDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in a prosecution under the Controlled Substance Analogue Enforcement Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-13 (21 U.S.C. 813), the government must prove that the defendant knew, had a strong suspicion, or deliberately avoided knowing that the substance that he was intentionally distributing for human consumption possessed the characteristics of a controlled substance analogue.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 753 F.3d 432. The memorandum opinion of the district court (Pet. App. 44a-68a) is reported at 15 F. Supp. 3d 668.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on May 21, 2014. A petition for rehearing was denied on June 17, 2014 (Pet. App. 69a). On August 21, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 14, 2014, and the petition was filed on October 2, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted on one count of conspiring to distribute a substance or mixture containing controlled substance analogues, in violation of 21 U.S.C. 841(b)(1)(C) and 21 U.S.C. 846, and eight counts of distributing a substance or mixture containing a controlled substance analogue, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 28a-32a; see 21 U.S.C. 813, 802(32). He was sentenced to 33 months of imprisonment, to be followed by 30 months of supervised release. Pet. App. 33a-35a. The court of appeals affirmed. *Id.* at 1a-27a.

1. In July 2011, a drug enforcement task force began investigating the use and distribution of substances commonly known as "bath salts" in the Charlottesville, Virginia, area. Pet. App. 5a; Gov't C.A. Br. 3-4. Bath salts are used as recreational drugs and, when ingested, are capable of producing effects similar to those produced by controlled substances, including cocaine, methamphetamine, and methcathinone. Pet. App. 5a; Gov't C.A. Br. 4.

The task force focused on a Charlottesville video rental store, owned and operated by Lois McDaniel, that sold bath salts. Pet. App. 5a; Gov't C.A. Br. 4. Using confidential informants, investigators purchased bath salts from McDaniel twice. *Ibid.* Testing revealed that the bath salts contained 3,4-methylenedioxypyrovalerone (MDPV) and 3,4-methylenedioxymethcathinone (MDMC), also known as methylone. *Ibid.* Additional bath salts later seized from McDaniel's store contained a combination of MDPV,

MDMC, and methylethylcathinone (4-MEC). Pet. App. 5a; Gov't C.A. Br. 4-5.

McDaniel agreed to cooperate with investigators, and she informed them that petitioner had supplied the bath salts she was selling. Pet. App. 5a; Gov't C.A. Br. 4-5. McDaniel agreed to make recorded telephone calls to petitioner to order more bath salts. Pet. App. 5a; Gov't C.A. Br. 6-11.

During the calls, petitioner stated that one of his products was "the replacement for the MDPV." Gov't C.A. Br. 7; explained that another product was a mixture of a straight chemical called "Alpha" and 4-MEC," *id.* at 8; discussed which of his products was the "most powerful" and "intense," *ibid.*; and expressly compared his products to cocaine and methamphetamine, *id.* at 8-11. See Pet. App. 5a-6a. At times, petitioner also sought to avoid explicit discussion about the nature of the substances he was selling. For example, when McDaniel asked petitioner which of his products was an alternative for methamphetamine, petitioner responded, "we don't talk about that, you know that." Gov't C.A. Br. 10-11.

With McDaniel's assistance, investigators purchased bath salts from petitioner on five occasions in 2011 and 2012. Pet. App. 6a; Gov't C.A. Br. 6-7. Testing confirmed that the bath salts contained MDPV, MDMC, and 4-MEC. *Ibid.*

In February 2012, officers arrested petitioner and executed a search warrant at his New York business. Gov't C.A. Br. 11. A number of bath salts were recovered, submitted for laboratory analysis, and determined to contain 4-MEC. *Ibid.* Petitioner's personal computer also was seized and subsequently searched. *Ibid.* E-mails on the computer demonstrated that

petitioner had attempted to disguise the true nature of his business. *Ibid.* For example, in one e-mail to a customer who was searching for bath salts on petitioner's website, petitioner wrote, "look at green valley oils, it's a front for the hardball." *Ibid.* In another e-mail, petitioner told a customer to look for a product "under the Green Valley Oils with the Hardball Aromatherapy. * * * [T]rying to put some shade on it." *Id.* at 11-12.

2. Under the Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act), Pub. L. No. 99-570, 100 Stat. 3207-13, "[a] controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I." 21 U.S.C. 813. Accordingly, it is unlawful "for any person knowingly or intentionally" to distribute a controlled substance analogue for human consumption. 21 U.S.C. 841(a)(1).

The term "controlled substance analogue" is generally defined to mean a substance:

> (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
>
> (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
>
> (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central

> nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

21 U.S.C. 802(32)(A). The majority of courts to have considered the question have held that the foregoing definition must be read in the conjunctive, *i.e.*, that a substance qualifies as a controlled substance analogue only if it satisfies Subsection (i) and either Subsection (ii) or Subsection (iii). See *United States* v. *Turcotte*, 405 F.3d 515, 521-523 (7th Cir. 2005) (surveying case law), cert. denied, 546 U.S. 1089 (2006). The definition also expressly excludes any controlled substance, any drug approved by the Food and Drug Administration, or the investigational use of a drug. See 21 U.S.C. 802(32)(C).

3. On November 14, 2012, a federal grand jury sitting in the Western District of Virginia returned a superseding indictment charging petitioner with one conspiracy count and eight substantive counts related to his distribution of substances containing the controlled substance analogues MDPV, MDMC, and 4-MEC. Pet. App. 6a; Gov't C.A. Br. 2.

At trial, in addition to other evidence, the government presented the testimony of two expert witnesses: Dr. Thomas DiBerardino, a chemist with the Drug Enforcement Administration (DEA), and Dr. Cassandra Prioleau, a DEA drug science specialist. Pet. App. 7a; Gov't C.A. Br. 13. Dr. DiBerardino testified that MDPV has a chemical structure that is substantially similar to methcathinone, a Schedule I controlled substance, and that phenethylamine is the core chemical structure for both methcathinone and MDPV. Pet. App. 7a; Gov't C.A. Br. 13-14. Dr. DiBerardino also

opined that the chemical structure of 4-MEC (methylethylcathinone) is also substantially similar to the chemical structure of methcathinone, and, again, that both substances are part of the phenethylamine core chemical family and that their minor chemical structural difference is so slight as to make them chemically substantially similar. *Ibid.* Finally, Dr. DiBerardino testified that MDMC is chemically substantially similar to MDMA, also known as ecstasy, a Schedule I controlled substance. Pet. App. 7a; Gov't C.A. Br. 14. Dr. DiBerardino explained that both MDMC and MDMA have phenethylamine as their core chemical structure, and, using chemical structure overlays for both MDMC and MDMA, he described to the jury how the minor chemical structural differences between the two substances are so slight as to make them chemically substantially similar. *Ibid.*

Dr. Prioleau testified to the pharmacological similarity element. Pet. App. 7a; Gov't C.A. Br. 14-15. She testified that 4-MEC and MDPV each produces a stimulant effect on the central nervous system substantially similar to that produced by methcathinone, the controlled substance to which they are chemically similar. Pet. App. 7a-8a; Gov't C.A. Br. 15-16. She also testified that MDMC produces a stimulant effect on the central nervous system substantially similar to that produced by MDMA, the controlled substance to which it is chemically similar. *Ibid.*

The government also introduced the testimony of a former methamphetamine addict, Toby Sykes, who had purchased bath salts from McDaniel. Pet. App. 17a. He testified that the bath salts "produced a far more potent effect on his body than the use of methamphetamine." *Ibid.*

The district court instructed the jury, among other things, that the government had to prove the following elements beyond a reasonable doubt:

> First, that the defendant knowingly and intentionally distributed a mixture or substance that has an actual, intended, or claimed stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II of the Controlled Substances Act;
>
> Second[,] that the chemical structure of the mixture or substance is substantially similar to the chemical structure of a controlled substance in Schedule I or II of the Controlled Substances Act[;] [a]nd,
>
> Third[,] that the defendant intended for the mixture or substance to be consumed by humans.

Gov't C.A. Br. 59-60 (brackets in original); see Pet. App. 56a. The court denied petitioner's request for an instruction stating that the government had to prove that he knew, had a strong suspicion, or deliberately avoided knowing "that the substances that he was distributing possessed the characteristics of controlled substance analogues." Gov't C.A. Br. 57-58.

4. The jury found petitioner guilty of each of the nine counts alleged in the indictment. Pet. App. 9a, 29a-32a; Gov't C.A. Br. 3. In denying petitioner's subsequent motion for a judgment of acquittal, Pet. App. 44a-68a, the district court rejected petitioner's claim that the jury instructions were erroneous, *id.* at 54a-60a. The court stated that petitioner's re-

quested scienter instruction to find a violation of the Analogue Act was "not required by the statute or Fourth Circuit precedent." *Id.* at 58a (citing *United States* v. *Klecker*, 348 F.3d 69, 71-72 (2003), cert. denied, 541 U.S. 981 (2004)).

The district court sentenced petitioner to 33 months of imprisonment, to be followed by 30 months of supervised release. Pet. App. 33a-35a.

5. The court of appeals affirmed. Pet. App. 1a-27a. The court of appeals held that the district court did not abuse its discretion in declining to instruct the jury that the government was required to prove under the Analogue Act that petitioner "knew, had a strong suspicion, or deliberately avoided knowledge that the alleged [controlled substance analogues] possessed the characteristics of controlled substance analogues." *Id.* at 21a-22a. In order to show an abuse of discretion, the court noted, the defendant must show, among other things, that the proposed instruction "was correct." *Ibid.* (quoting *United States* v. *Bartko*, 728 F.3d 327, 343 (4th Cir. 2013), cert. denied, 134 S. Ct. 1043 (2014)). The court held that petitioner's proposed instruction failed because it was incorrect. *Ibid.*

The court of appeals observed that, under *Klecker*, the government must prove that the defendant intended that the substance at issue be consumed by humans, but need not prove that the defendant knew the substance was a controlled substance analogue. Pet. App. 21a-22a (citing *Klecker*, 348 F.3d at 71-72). *Klecker* held:

> In order to show an Analogue Act violation, the Government must prove (1) substantial *chemical* similarity between the alleged analogue and a controlled substance, *see* 21 U.S.C.A. § 802(32)(A)(i);

> (2) actual, intended, or claimed *physiological* similarity (in other words, that the alleged analogue has effects similar to those of a controlled substance or that the defendant intended or represented that the substance would have such effects), *see id.* § 802(32)(A)(ii), (iii); and (3) *intent* that the substance be consumed by humans, *see id.* § 813.

348 F.3d at 71.

The court of appeals noted that the Seventh Circuit had stated in *Turcotte* that the government must prove "that the defendant knew the substance in question was a controlled substance analogue." Pet. App. 21a-22a (quoting *Turcotte*, 405 F.3d at 527). But, the court explained, the Fourth Circuit had "not imposed such a knowledge requirement." *Ibid.* Moreover, the court stated, it had "not included the concepts of 'strong suspicion' or 'deliberate avoidance' in framing the scienter requirement under the Act." *Ibid.* Accordingly, the court held that the district court had not abused its discretion in denying petitioner's proposed instruction. *Ibid.*[1]

ARGUMENT

Petitioner asserts (Pet. 12-25) that this Court's review is warranted because the courts of appeals disagree about whether, in an Analogue Act prosecution, the government must prove that the defendant knew, strongly suspected, or deliberately avoided knowing

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[1] The court of appeals also rejected petitioner's claims that the Analogue Act is unconstitutionally vague as applied to him, Pet. App. 9a-16a; that the district court committed evidentiary errors, *id.* at 16a-20a; and that the evidence was insufficient to support his convictions, *id.* at 22a-26a. Petitioner does not renew those claims in this Court.

that the substance he distributed for human consumption possessed the characteristics of a controlled substance analogue. Although some disagreement exists in the courts of appeals over the knowledge requirement in Analogue Act prosecutions, petitioner overstates the breadth and depth of the disagreement. Only the Fourth and Seventh Circuits have squarely addressed the question, and the difference between the rules articulated in those two circuits is less stark than petitioner suggests. Certiorari at this time thus would be premature, as further percolation in the lower courts would benefit this Court. This case also does not present a suitable vehicle for resolving any conflict. No circuit has squarely embraced the particular formulation petitioner proposed below, and any instructional error was harmless in light of the extensive evidence of petitioner's knowledge that the substances he was distributing had the characteristics of controlled substance analogues.

1. The court of appeals correctly held that the district court did not abuse its discretion in rejecting petitioner's proposed jury instruction.

a. As with any statutory question, an analysis of the Act's mental state requirements "begin[s] by examining the text." *Carter* v. *United States*, 530 U.S. 255, 271 (2000). Here, Congress included three express mental-state requirements in the provisions that define an Analogue Act violation. First, the defendant must distribute the substance "knowingly or intentionally," 21 U.S.C. 841(a)(1). Second, he must "inten[d]" that it be used "for human consumption," 21 U.S.C. 813. And, third, to satisfy the "representation" prong of the definition of a "controlled substance analogue," he must "represen[t] or inten[d]" that it

has "a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II," 21 U.S.C. 802(32)(A)(iii). See *United States* v. *Desurra*, 865 F.2d 651, 653 (5th Cir. 1989) (per curiam); *United States* v. *Klecker*, 348 F.3d 69, 71 (4th Cir. 2003).

While the "representation" prong of the definition of a controlled substance analogue contains a mental state requirement (see 21 U.S.C. 802(32)(A)(iii)), the other two prongs of the definition—requiring a chemical structure similar to a scheduled controlled substance and a substantially similar effect on the central nervous system (21 U.S.C. 802(32)(A)(i) and (ii))—contain no express mental-state element. The statute provides that those two prongs are satisfied when, respectively, a substance has a "chemical structure" that "is substantially similar to the chemical structure of a controlled substance," and the substance "has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance." 21 U.S.C. 802(32)(A)(i) and (ii). The juxtaposition of express mental-state elements in several places in the Analogue Act—including the third prong of the definition—suggests that the omission of a mental-state requirement in the first two prongs of the definition was intentional. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intention-

ally and purposely in the disparate inclusion or exclusion." *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997); see *Russello* v. *United States*, 464 U.S. 6, 23 (1983).[2]

b. Petitioner argues (Pet. 19-20) that the Analogue Act adds analogues to the substances criminalized under the Controlled Substances Act (CSA) Pub. L. No. 91-513, 84 Stat. 1242 (21 U.S.C. 801 *et seq.*), and thus the mens rea requirement under 21 U.S.C. 841(a)—that a defendant know that he possesses a controlled substance—applies to the Analogue Act, such that a defendant must know that the substance he possesses has the characteristics of a controlled substance. But as noted above, the text weighs against that reading. And as the Seventh Circuit explained in *United States* v. *Turcotte*, 405 F.3d 515 (2005), cert. denied, 546 U.S. 1089 (2006), "applying the standard requirement that a defendant must know the substance in question is a 'controlled substance' is nonsensical since controlled substance analogues are, by definition, not 'controlled substances'—their distribution is criminalized, despite their omission from

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[2] The legislative history on point is limited. The Senate Report states that "the offender must have known or intended that he was manufacturing, distributing, or possessing a substance that he knew or intended to have the characteristics of a controlled substance analogue." S. Rep. No. 196, 99th Cong., 1st Sess. 4 (1985). But the Senate had adopted a simpler two-pronged definition of "controlled substance analogue." *Id.* at 6, 9. The House rejected the Senate's proposal and instead adopted the three-pronged definition that, with modifications not relevant here, became law. See H.R. Rep. No. 848, 99th Cong., 2d Sess. 6 (1986). When describing the operation of its three-part definition, the House Report does not mention or suggest that the defendant must have known about the substance's chemistry or drug effects. See *ibid.*

the government's controlled substances schedules, because they have similar chemical structures and either actually or purportedly similar physiological effects to controlled substances." *Id.* at 526. Whether a substance is an analogue is thus not a question of law but a question of fact for the jury. *Id.* at 526-527. Accordingly, "[d]irect and literal application of the scienter requirement applicable to § 841(a) * * * would threaten to eviscerate the Analogue Provisions of § 802(32)(A) at one stroke." *Id.* at 527.

Petitioner argues (Pet. 20-22) that this Court should draw an analogy to *Staples* v. *United States*, 511 U.S. 600 (1994), and require proof of knowledge that the substance had the "characteristics" that bring it within the statutory definition of a controlled substance analogue. But *Staples* is inapposite because it involved a criminal statute with no express mens rea requirement, see *id.* at 605, and the Court's "narrow" holding was simply that Congress did not intend it to be a rare strict-liability criminal offense, *id.* at 619. By contrast, courts need not add implied mental-state requirements to the Analogue Act to avoid making it a strict-liability statute. The Analogue Act already contains express mental-state requirements. The instruction below thus required the jury to find (1) that petitioner "knowingly and intentionally distributed a mixture or substance that has an actual, intended, or claimed" drug effect that is "substantially similar to or greater than" a controlled substance's drug effect; and (2) that he intended it for human consumption. Gov't C.A. Br. 59-60; Pet. App. 56a.

Petitioner's proposed instruction would also undermine Congress's core purpose in enacting the Analogue Act. "Congress enacted the Analogue Act to

prevent underground chemists from altering illegal drugs in order to create new drugs that are similar to their precursors in effect but are not subject to the restrictions imposed on controlled substances." *Klecker*, 348 F.3d at 70; see *United States* v. *Hodge*, 321 F.3d 429, 437 (3d Cir. 2003) ("The Analogue Act's purpose is to make illegal the production of designer drugs and other chemical variants of listed controlled substances that otherwise would escape the reach of the drug laws."); *Turcotte*, 405 F.3d at 523 (similar). The legislative history repeatedly references the "clandestine chemists" and distributors of designer drugs who are at the heart of the problem. See, *e.g.*, S. Rep. No. 196, 99th Cong., 1st Sess. 1, 3, 6 (1985) (Senate Report); H.R. Rep. No. 848, 99th Cong., 2d Sess. 2, 5 (1986) (House Report). The legislative history also emphasizes the need for "swift investigation and prosecution" of such distributors of designer drugs. House Report 2; see Senate Report 3 ("Strong measures are needed to attack this problem.").

Petitioner's proposed instruction, however, could impede prosecution of street-level dealers and others in the designer drug distribution chain. See *Turcotte*, 405 F.3d at 527 (such a requirement "may impose a significant prosecutorial burden in some cases"). Petitioner would have the government prove in all Analogue Act prosecutions that the defendant "knew, had a strong suspicion, or deliberately avoided know-[ing]," among other things, that the substance's chemical structure was substantially similar to that of a controlled substance. Pet. 9; see Gov't C.A. Br. 57-58; 21 U.S.C. 802(32)(A)(i). But it is "particularly nettlesome" and may be "extremely difficult to *prove*" in some cases that a defendant had knowledge of these

"intricacies of chemical science." *Turcotte*, 405 F.3d at 527.

To make matters worse, savvy distributors could protect their distribution networks by lying to those beneath them in the distribution chain and telling them that an analogue was "completely new," with effects that are similar to but "even better" than the controlled substance from which it was derived. And with less ability to investigate, prosecute, and convict dealers at the bottom and middle of the distribution chain, the government may have less ability to gain leverage and knowledge needed to prosecute and convict distributors at the top. Petitioner's proposed rule thus may undermine Congress's core purpose of preventing distributors of designer drugs from remaining one step ahead of law enforcement.

Petitioner appears to suggest (Pet. 22-25) that his proposed instruction should be adopted to avoid a "vagueness difficulty." But petitioner does not present a claim that the statute is unconstitutionally vague as applied to him, see Pet. i, and "[t]he circuit courts considering this issue have unanimously held that the CSA's Analogue Provision is not unconstitutionally vague." *Turcotte*, 405 F.3d at 531; see *United States* v. *Bamberg*, 478 F.3d 934, 937-938 (8th Cir. 2007), cert. denied, 552 U.S. 1261 (2008); *United States* v. *Roberts*, 363 F.3d 118, 122-126 (2d Cir. 2004); *Klecker*, 348 F.3d at 71-72; *Desurra*, 865 F.2d at 653. Notably, the Seventh Circuit held that, "even leaving aside the implications of our scienter ruling, the Analogue Provision seems to us sufficiently clear by its own terms." *Turcotte*, 405 F.3d at 531.

Petitioner's arguments about vagueness also illustrate why his proposed instruction is unworkable. As

petitioner observes (Pet. 23), "a substance's chemical structure [is] a fact (unlike the mechanics of a firearm) that cannot easily be determined without the use of sophisticated equipment and analysis." He adds (Pet. 24) that "even if ordinary citizens could be expected to be able to discover the chemical structure of alleged analogue substances, they would still be left to guess whether the inevitable combination of similarities and dissimilarities render the substance 'substantially similar' to a controlled substance in the minds of a jury faced with competing expert testimony." But the ability of defendants to make similar arguments to a jury under petitioner's proposed instruction is precisely why his proposed instruction would be a barrier to effective enforcement of the Analogue Act.

As this case illustrates, a person who sells "bath salts" for use as recreational drugs, compares them to controlled substances, and modifies his wares slightly to remain one step ahead of the DEA's efforts to list new controlled substances, should not be heard to complain that he is innocent simply because he did not know whether a jury would find his bath salts to meet the statutory definition of an analogue. Indeed, petitioner's position comes close to sanctioning a mistake-of-law defense in Analogue Act cases. "The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." *Cheek* v. *United States*, 498 U.S. 192, 199 (1991). Knowledge of the particular chemical relationship between a new drug and a controlled substance is "so closely related to knowledge" of the Analogue Act "that requiring the Government to prove the former would in effect require it to prove

knowledge of the law." *Staples*, 511 U.S. at 622 n.3 (Ginsburg, J., concurring in the judgment).

2. Petitioner correctly observes that the circuits are divided over the application of the mens rea requirement in Analogue Act prosecutions, but he overstates the extent of disagreement in the circuits over this issue. Petitioner contends (Pet. 14-15) that there is a 3-2 split, with the Second, Seventh, and Eighth Circuits holding "that the defendant must know that the substance in question is a controlled substance analogue," while the Fourth and Fifth Circuits hold that such knowledge is not required. Although petitioner is correct that the Seventh Circuit has analyzed this issue in *Turcotte* and articulated a rule that differs from the Fourth Circuit's rule applied below, the Second and Eighth circuits have not addressed the issue squarely. Petitioner also overstates the practical difference between the rule articulated in *Turcotte* and the rule applied below. Crucially, the Seventh Circuit declined to endorse a rule similar to the instruction petitioner proposed below because it could pose a practical barrier to prosecution.

a. In *Turcotte*, a jury had convicted the defendant under the Analogue Act for knowingly and intentionally possessing the substance gamma butyrolacetone (GBL) with intent to distribute. 405 F.3d at 520, 523-524. The jurors had been instructed that they "could convict [the defendant] even if they did not find that he knew GBL was a 'controlled substance.'" *Id.* at 520. On appeal, the Seventh Circuit stated that this instruction was incorrect. The Seventh Circuit noted that the Analogue Act "imposes criminal liability through the more general provisions of the CSA, 18 U.S.C. § 841(a), which implicate a well-established

scienter requirement." *Id.* at 525. Specifically, "defendants must know that the substance in question is a controlled substance." *Ibid.* "[K]nowledge of the specific substance involved will usually automatically imply knowledge that the substance is controlled," and knowledge is also satisfied when the defendant "is at least aware that it is a controlled substance" even if he "does not know its specific identity." *Id.* at 525-526.

But, the court of appeals explained, "the exact contours" of Section 841's scienter requirement "are not obvious in the context" of the Analogue Act. *Turcotte*, 405 F.3d at 526. "[A]pplying the standard requirement that a defendant must know the substance in question is a 'controlled substance' is nonsensical." *Ibid.* Analogues "are, by definition, not 'controlled substances'—their distribution is criminalized, despite their omission from the government's controlled substances schedules, because they have similar chemical structures and either actually or purportedly similar physiological effects to controlled substances." *Ibid.* A defendant thus cannot know "conclusively *ex ante*" whether a substance is an analogue; it is a fact that the jury must find at trial (applying the three clauses of [Section 802(32)(A)])." *Id.* at 526-527. "Direct and literal application of the scienter requirement applicable to § 841(a), in other words, would threaten to eviscerate the Analogue Provisions of § 802(32)(A) at one stroke." *Id.* at 527. By contrast, in the Seventh Circuit's view, "[d]iscarding the scienter requirement would essentially mean that individuals deal in narcotics substitutes at their own risk, removing a primary *mens rea* element of possession and distribution offenses." *Ibid.*; (without an additional scienter re-

quirement, the Analogue Act could "ensnare individuals engaged in apparently innocent conduct" and would be "more vulnerable to vagueness challenges" (citation omitted)).

In light of these considerations, the Seventh Circuit "fe[lt] that [its] precedents demand[ed] a showing that the defendant knew the substance in question was a controlled substance analogue. That is, the defendant must know that the substance at issue meets the definition of a controlled substance analogue set forth in § 802(32)(A)." *Turcotte*, 405 F.3d at 527. Specifically, the defendant "must know that the substance at issue has a chemical structure substantially similar to that of a controlled substance, and he or she must either know that it has similar physiological effects or intend or represent that it has such effects." *Ibid.*

The Seventh Circuit recognized, however, that "requiring the government to prove scienter as to these criteria may impose a significant prosecutorial burden in some cases." *Turcotte*, 405 F.3d at 527. "The question of similar chemical structure is particularly nettlesome since, even if such chemical similarities exist, and even if the defendant is aware of these similarities, the intricacies of chemical science may render it extremely difficult to *prove* that a defendant had such knowledge." *Ibid.* The Seventh Circuit crafted a "provisional remedy" for the "problem" its reading of the statute created: "[W]e prescribe that * * * if the scienter requirement is met with regard to the second part of the analogue definition (knowledge or representation of similar physiological effects), the jury is permitted—but not required—to infer that the

defendant also had knowledge of the relevant chemical similarities." *Ibid.*[3]

This inference considerably narrows the difference between *Turcotte* and the decision below. Pursuant to this inference, the kind of evidence that will often be available in Analogue Act prosecutions (such as evidence that the defendant intended that the product would be used as a drug and knew or claimed that it had drug effects equivalent or greater to those of a controlled substance) can permit a jury to find a defendant guilty, notwithstanding the absence of direct evidence that he knew the substance's chemical structure, the structure of a controlled substance, and the relationship between the two. *Turcotte* therefore will not necessarily lead to different outcomes in the Fourth and Seventh Circuits.

Petitioner's proposed instruction, however, did not expressly provide for such an inference. This stands in contrast to instructions adopted by courts that have followed *Turcotte*. For example, in *United States* v. *Gross*, No. 13-cr-268, 2014 WL 6483307 (S.D. Ala. Nov. 20, 2014), a district court adopted the *Turcotte* formulation, including that inferential proof could satisfy the first prong. "[A] likely reason for believing, intending or representing that a substance has physiological effects substantially similar to those of a controlled substance is an understanding that the

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[3] *Turcotte* ultimately held that the instructional error had been harmless. 405 F.3d at 529. In particular, the defendant was "on notice" that the drug he was selling, GBL, "qualifies as a controlled substance analogue" because "Congress has specifically identified GBL as an analogue" of the controlled substance gamma hydroxybutyric acid (GHB). *Ibid.*

substance has a chemical structure substantially similar to the controlled substance." *Id.* at *5.

b. Petitioner asserts that the Second and Eighth Circuits disagree with the rule the Fourth Circuit applied below. See Pet. 14-15 (citing *United States* v. *Roberts*, 363 F.3d 118, 123 n.1 (2d Cir. 2004); *United States* v. *Sullivan*, 714 F.3d 1104, 1107 (8th Cir. 2013)). But *Roberts* and *Sullivan* do not address the issue squarely.

This passage in *Roberts* that addresses the mens rea requirement in Analogue Act cases is dictum because the mens rea requirement was not in dispute and the court's holding did not depend on it. The only issue on appeal in *Roberts* was whether the phrase "substantially similar [in] chemical structure" in Section 802(32)(A)(i) was unconstitutionally vague as applied to the chemical 1,4-butanediol. 363 F.3d at 119, 123. The Second Circuit held that it was not. The court explained that the defendants "could have readily ascertained" it was an analogue based on evidence that DEA regulations described 1,4-butanediol as an analogue of gamma hydroxybutyric acid (GHB), a controlled substance; two-dimensional diagrams showed there was only a two-atom difference between it and GHB; and 1,4-butanediol is metabolized into GHB. *Id.* at 123-127.

Without the benefit of briefing from either party, the court stated in a footnote in the background section of its opinion that the Analogue Act requires proof that the defendants had "knowledge that they were in possession of a controlled substance." *Roberts*, 363 F.3d at 123 n.1 (citing 21 U.S.C. 841(a)); see Appellant Br., Appellee Br., and Reply Br. in *Roberts*, *supra* (No. 02-1604). Citing a non-Analogue Act case,

the court added that the defendants "need not know the exact nature of the drug; it is sufficient that they be aware that they possessed 'some controlled substance.'" *Roberts*, 363 F.3d at 123 n.1 (quoting *United States* v. *Morales*, 577 F.2d 769, 773 (2d Cir. 1978)).

As the placement of this passage suggests, it is dictum. Notably, in holding that the defendants had adequate notice that the chemical structures of 1,4-butanediol and GHB are substantially similar, the court of appeals relied on evidence showing that the two chemicals are, in fact, structurally similar—and the court did not cite record evidence that the defendants actually *knew* of that structural similarity. *Roberts*, 363 F.3d at 123-126. In any event, *Roberts*'s dictum relying on Section 841(a)'s knowledge requirement is unsound and unlikely to be followed when the issue is squarely presented. As the Seventh Circuit has explained "applying the standard requirement that a defendant must know the substance in question is a 'controlled substance' is nonsensical since controlled substance analogues are, by definition, not 'controlled substances.'" *Turcotte*, 405 F.3d at 526. For that reason, the court in *Turcotte* distinguished *Roberts* rather than citing it with approval. *Ibid.*

Sullivan also does not squarely address the mens rea issue. *Sullivan* involved a sufficiency-of-the-evidence challenge to a conviction under the Analogue Act for selling bath salts containing mephedrone, an analogue of methcathinone. 714 F.3d at 1106-1107. Although the court stated that the elements of the offense include that the defendant must "kn[o]w he was in possession of a controlled substance analogue," *id.* at 1107, the court did not analyze the scienter

requirement or cite *Turcotte* or any other case addressing the issue. Furthermore, *Sullivan* does not suggest that, to satisfy the knowledge requirement, the defendant must know or suspect that the substance possessed the "characteristics" of an analogue, such as a "substantially similar" chemical structure: it affirmed the conviction without pointing to any record evidence of the defendant's knowledge of drug chemistry. Rather, the Eighth Circuit found the knowledge requirement satisfied based on the defendant's statements indicating that he knew "the bath powder was illegal." *Ibid.* That is, *Sullivan* affirmed based on evidence that the defendant knew that the substance he possessed was illegal. The court did not require evidence that the defendant knew or suspected the relationship between the chemical structure of the substance he possessed and that of a controlled substance—the requirement that petitioner would impose here.

In sum, the disagreement among the courts of appeals is not as developed or "stark" (Pet. 17) as petitioner contends. Only the Fourth and Seventh Circuits have squarely addressed the point, and *Turcotte*'s allowance for inferential proof of the chemical-structure prong significantly reduces the practical difference between the two rules. It would therefore be premature for this Court to intervene.

3. This case is also not a suitable vehicle for resolving the disagreement on the mental state required under the Analogue Act. First, as shown above, no circuit has squarely adopted the particular formulation petitioner advanced below. In particular, petitioner's proposed instruction did not provide for the inference *Turcotte* articulated and that other district

courts following *Turcotte* have applied. Second, petitioner's conviction would likely have been affirmed on harmless-error grounds in any circuit that has addressed the knowledge issue. See *Neder* v. *United States*, 527 U.S. 1 (1999) (omission of an element from a jury instruction is subject to harmless-error analysis). In particular, the evidence presented to the jury established beyond a reasonable doubt that petitioner knew or strongly suspected that he was dealing with controlled substance analogues. See, *e.g.*, *United States* v. *Mack*, 729 F.3d 594, 608 (6th Cir. 2013) (jury instruction error is harmless when it is clear beyond a reasonable doubt that the outcome would not change had the jury been properly instructed), cert. denied, 134 S. Ct. 1338 (2014); see also *Turcotte*, 405 F.3d at 529 (affirming Analogue Act conviction on harmless error grounds).

Petitioner knowingly sold "bath salts" containing MDPV, MDMC, and 4-MEC to be used as substitutes for controlled substances. Pet. App. 5a-6a.[4] Petitioner's bath salts were "white powder," "off-white powder," and "beige crystalline powder," which petitioner sold in plastic "baggies," plastic vials, and "blue jeweler's bag[s]." C.A. App. 132, 137-139, 151, 158, 340, 643. The prices petitioner set for his products (and the prices users paid) further suggest his knowledge of illegality: He sold them to McDaniel for $15 per gram (approximately $425 per ounce), and she sold them to her customers for $30 to $70 per gram ($850 to $1984 per ounce). Gov't C.A. Br. 6. The names

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[4] During the course of the government's investigation, the DEA classified MDPV and methylone as controlled substances. See Pet. App. 6a n.2. The government did not charge petitioner with distributing either product after this classification. *Ibid.*

petitioner gave his products further indicate that he knew both that they had drug effects and that they were either controlled substances or closely related to controlled substances: Speed, No Speed, The New Up, Alpha, Sheen's Winning, and Hardball. *Ibid.*

On the telephone calls with McDaniel and investigators, petitioner stated that one of his products was "the replacement for the MDPV"—which petitioner had previously sold but had been recently listed as a controlled substance. Gov't C.A. Br. 7. Petitioner explained that another product was a straight chemical called "Alpha" mixed with 4-MEC. *Id.* at 8. He discussed which of his products was the "most powerful" and "intense." *Ibid.* Petitioner told McDaniel that the mixture of Alpha and 4-MEC was "like cocaine"; that "No Speed Limit" was like crystal meth; and that the "new Sheens" was "more like the meth" or "synthetic meth" than like synthetic cocaine. *Id.* at 8-10; see *id.* at 9-10 (petitioner describing the "new Sheens" as giving "a harder hit to a shorter period of time"); Pet. App. 5a-6a. A former methamphetamine addict who had purchased bath salts from McDaniel testified that they "produced a far more potent effect on his body than his use of methamphetamine." Pet. App. 17a.

The record evidence also showed that petitioner attempted to conceal his activities, further suggesting that he was conscious of his own wrongdoing. For example, when asked which of his products was an alternative for methamphetamine, petitioner responded, "we don't talk about that, you know that." Gov't C.A. Br. 10-11.[5] Petitioner also attempted to disguise

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[5] Petitioner went on, however, to state that "the closest thing you have to that as an alternative is Hardball." C.A. App. 744.

the true nature of his business, telling a buyer searching for bath salts on his website to "look at green valley oils" and describing it as "a front for the hardball." *Id.* at 11; see *id.* at 12 (telling a customer to look for a product "under the Green Valley Oils with the Hardball Aromatherapy. * * * [T]rying to put some shade on it."). And petitioner advised McDaniel about which of his bath salts should be snorted or smoked, again speaking obliquely. See C.A. App. 741-742 ("[S]ome people like to put it directly on a burner and then it smokes. You know, you smoke," but for other substances "some people like to use it just as an aromatherapy to, you know, to smell it. * * * You know what I mean? * * * [I]t depends on usage which chemical I would send you.").

Petitioner emphasizes that he checked the DEA's website to see whether any of the substances he sold were listed as a controlled substance and that he did not sell any substance after it was listed. See Pet. 7. But that is not a sign of innocence of an Analogue Act violation; rather, it indicates that he knew that the products he sold were similar to controlled substances, had drug effects that could warrant them being controlled, and strongly suspected they might already be illegal. If he had been unaware or unsuspecting that the products he sold had the characteristics of controlled substance analogues, he would never have checked the DEA's website to see whether they were already controlled. Cf. *Sullivan*, 714 F.3d at 1107 (that petitioner "indicat[ed] the bath powder was illegal supports a reasonable inference he knew the powder contained a controlled substance analogue"). Furthermore, when one of the drugs he sold was added to Schedule I (MDPV), petitioner did not respond

by ceasing his operations and getting out of the business of selling "bath salts" for use as recreational drugs. Instead, he began selling a "replacement for MDPV." Gov't C.A. Br. 7.

These facts together make it clear beyond a reasonable doubt that any jury would have found that petitioner knew he was dealing with controlled substance analogues. See *Turcotte*, 405 F.3d at 529 n.7 (where defendant intended or represented that substance had similar physiological effects to a controlled substance, "as a matter of common sense, it would seem strange to allow [defendant] to claim he did not know" the substance was an analogue of the controlled substance); cf. *Sullivan*, 714 F.3d at 1107 (that petitioner "indicat[ed] the bath powder was illegal supports a reasonable inference he knew the powder contained a controlled substance analogue").

Accordingly, even without petitioner's preferred jury instruction, his convictions would likely have been affirmed in the Seventh Circuit. As such, this case does not present a suitable vehicle for resolving any disagreement among the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2014